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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

MICAIAH FILKINS, Plaintiff and Appellant, v. DANIEL LEE BECKER, Defendant and Respondent.	C085909 (Super. Ct. No. SCV0038789)

In 2012 plaintiff Micaiah Filkins signed a contract of employment ("Agreement") with Force By Design, Inc. (FBD). Defendant Daniel Lee Becker, a director of FBD, signed the Agreement on the company's behalf, and in 2013, participated in a meeting at which FBD ended Filkins's employment without paying to Filkins deferred salary and severance contemplated by the Agreement. In his original complaint, Filkins alleged that Becker aided and abetted FBD's conversion of his property. Becker demurred to the complaint, arguing Filkins's claim was "rooted in contract" and not cognizable as a tort of conversion. The trial court sustained the demurrer without leave to amend the original complaint.

In his briefing on appeal, Filkins presents three arguments. First, he argues conversion of unpaid wages is a valid cause of action in California. Second, he argues the trial court erred in ruling inadequate the complaint's allegations of Becker's aiding and abetting FBD's conversion of Filkins's property. Third, Filkins argues the trial court abused its discretion by denying Filkins an opportunity to amend his complaint.

While this appeal was pending, the California Supreme Court ruled that a typical failure to pay wages cannot support a conversion claim. (*Voris v. Lampert* (2019) 7 Cal.5th 1141 (*Voris*).)

In light of *Voris*, we shall conclude the trial court properly sustained Becker's demurrer, but that Filkins should be given an opportunity to amend his original complaint.

FACTUAL AND PROCEDURAL BACKGROUND

Beginning on November 15, 2012, the Agreement governed Filkins's employment with FBD, a California corporation. Filkins, who became president of the company, signed the Agreement for himself and Becker, chairman of FBD, signed on behalf of the company.

In a meeting held on December 16, 2013, FBD ended Filkins's employment effective immediately. Present at the meeting were Filkins, Becker, and David Stanton, chief executive officer of the company. Together, Becker and Stanton owned a majority of FBD's outstanding stock and constituted a majority of the company's board of directors.

Becker and Stanton encouraged Filkins to agree to characterize the end of his employment with FBD as a "resignation" but Filkins declined, and on December 14, 2016, he filed a complaint against Becker.

The Complaint

Filkins claimed FBD terminated his employment "without cause" and alleged one cause of action against Becker: aiding and abetting FBD's conversion of two pots of

money owed to Filkins under the Agreement: (1) deferred salary in the amount of $89,208.95 and (2) six months' severance in the amount of $94,000. Filkins alleged Becker aided and abetted FBD's conversion of his property because Becker "had actual knowledge of FBD's obligations to pay Filkins" the deferred salary and severance, "actually knew that FBD breached its obligations and converted Filkins'[s] [p]roperty when [FBD] failed . . . to pay those monies to Filkins," and "substantially assisted and encouraged FBD to convert Filkins'[s] [p]roperty," by "threatening to defame Filkins in order to persuade Filkins to waive his right to receive . . . the monies to which he was . . . entitled under the . . . Agreement."

Filkins claimed the deferred salary was his "property" pursuant to "section 5" of the Agreement, which addressed compensation, and provided in pertinent part: (a) Filkins's salary was $188,000 per year; (b) "[w]ith respect to the period beginning on the Effective Date [November 15, 2012] and ending on the first anniversary of the Effective Date (the "*First Year*"), Thirty-Eight Thousand Dollars Base Salary shall be deferred and not paid as a current salary (the '*Deferral Amount*')"; (c) FBD "shall pay [Filkins] two hundred percent . . . of the Deferral Amount, plus four percent . . . per annum thereon, on . . . : (i) January 2, 2016"; and three other enumerated conditions not germane to this appeal.[1]

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[1] Section No. 5 further provided: "Notwithstanding the foregoing, (i) if [Filkins], during the First Year, voluntarily terminates his employment or his employment is terminated by the Company for Cause . . ., the entire Deferral Amount shall be forfeited, and (ii) if during the First Year [Filkins's] employment is terminated by the Company other than for Cause or voluntarily by [Filkins], a pro rata portion of the Deferral Amount . . . shall be deemed vested and payable."

Section No. 2 of the Agreement provided the Agreement "expires one (1) year after the Effective Date, and shall automatically renew for successive terms of one year . . . unless a notice of non-renewal is delivered by one party to the other at least 60 days prior to the end of the Initial Term."

Filkins claimed six months' severance was his "property" pursuant to section No. 7(b) of the Agreement, which addressed the "[c]onsequences of termination," and obligated FBD to "continue the salary payments" to Filkins "for six (6) months from the date of termination," if the Agreement were ended under certain conditions, including FBD terminating Filkins's employment without cause.

Becker demurred, arguing inter alia, (1) Filkins's "tort of conversion" claim was "expressly and unambiguously rooted in contract," and (2) Filkins "failed to allege specific factual allegations showing substantial assistance" by Becker vis-à-vis the alleged conversion of Filkins's property.

In opposition to the demurrer, Filkins argued, inter alia: "[U]nder California law . . . an employer who fails to pay earned wages to its employee is liable for conversion"; the Agreement did not *preclude* the conversion claim; he had a "vested property interest" in the monies he sought to recover, because they were "earned but unpaid wages"; and, he met his pleading burden regarding Becker's aiding and abetting FBD.

In an April 2017 order, the trial court agreed with Becker, ruling the complaint contained "two significant pleading deficiencies."[2] First, "the factual allegations in the complaint d[id] not sufficiently allege an underlying action for conversion," because Filkins's "allegations all stem[med] from the alleged failure of . . . FBD, to pay him monies owed under a contract, not conversion. The simple failure to pay money owed does not constitute conversion," the trial court reasoned. Second, "[e]ven assuming" a "sufficiently allege[d]" conversion claim against FBD "from which Becker could be liable as an aider and abettor, [Filkins] ha[d] not sufficiently alleged facts necessary to

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[2] The trial court also granted Becker's request for judicial notice of "various documents related to [FBD's] [b]ankruptcy [p]roceeding" in the United States Bankruptcy Court for the Northern District of California, which proceeding began before Filkins filed his complaint.

qualify Becker [as] an aider and abettor." Filkins's allegations were "conclusory in nature and [did] not specifically allege substantial assistance or encouragement by [Becker] to convert [Filkins's] property." (Italics omitted.)

The trial court denied leave to amend, explaining that Filkins failed to demonstrate how he could remedy the complaint's deficiencies. Judgment was entered for Becker.

Filkins timely appealed.

DISCUSSION

I

"The function of a demurrer is to test the sufficiency of the complaint by raising questions of law. We give the complaint a reasonable interpretation and read it as a whole with all parts considered in their context. A general demurrer admits the truth of all material factual allegations. We are not concerned with the plaintiff's ability to prove the allegations or with any possible difficulties in making such proof. We are not bound by the construction placed by the trial court on the pleadings; instead, we make our own independent judgment. [Citation.]

"Where the trial court sustains the demurrer without leave to amend, we must decide whether there is a reasonable possibility the plaintiff can cure the defect with an amendment. If we find that an amendment could cure the defect, we must find the court abused its discretion and reverse. If not, the court has not abused its discretion. The plaintiff bears the burden of proving an amendment would cure the defect. [Citation.]" (*Scholes v. Lambirth Trucking Co*. (2017) 10 Cal.App.5th 590, 595; see also *City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 747 ["If the plaintiff has not had an opportunity to amend the complaint in response to the demurrer, leave to amend is liberally allowed as a matter of fairness"].)

II

In *Voris*, our Supreme Court, by a five-to-two decision, concluded a typical failure to pay wages cannot support a conversion claim. (*Voris, supra*, 7 Cal.5th at p. 1156 ["a

claim for unpaid wages resembles other actions for a particular amount of money owed in exchange for contractual performance—a type of claim that has long been understood to sound in contract, rather than as the tort of conversion"].)

The *Voris* court noted that conversion "is an 'ancient theory of recovery' with roots in the common law action of trover. [Citations.] 'This action originated at an early date as a remedy against the finder of lost goods who refused to return them to the owner but instead "converted" them to his own use.' [Citation.] Over time, the action was extended to cases involving 'dispossession, or . . . withholding possession by others than finders.' [Citation.] Today, the tort of conversion is understood more generally as 'the wrongful exercise of dominion over personal property of another.' [Citations.] [¶] As it has developed in California, the tort comprises three elements: '(a) plaintiff's ownership or right to possession of personal property, (b) defendant's disposition of property in a manner inconsistent with plaintiff's property rights, and (c) resulting damages.' [Citations.]" (*Voris, supra,* 7 Cal.5th at p. 1150.)

Our Supreme Court explained the tort of conversion is cognizable where a plaintiff had a specific " '*possessory interest*' " to an identifiable sum, and the defendant "interfered" with that right "by virtue of [the defendant's] own disposition of the property." (*Voris, supra,* 7 Cal.5th at p. 1151.) By contrast, the typical claim for earned but unpaid wages "is not that the employer has wrongfully exercised dominion over a specifically identifiable pot of money that already belongs to the employee—in other words, the sort of wrong that conversion is designed to remedy. Rather, the employee's claim is that the employer failed to reach into its own funds to satisfy its debt." (*Id.* at pp. 1152-1153.)[3]

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[3] *Voris* considered and distinguished or criticized authorities that defendant marshalled in his briefing in support of the proposition that conversion of unpaid wages is a valid cause of action. (See *Voris*, *supra*, 7 Cal.5th at 1149, fn. 6 [noting the absence of any

While the *Voris* court ruled that a "garden-variety suit involving wage nonpayment or underpayment" could not be the basis of a conversion claim, (*Voris, supra*, 7 Cal.5th at p. 1162; see also *id.* at p. 1156, fn. 11 ["the ordinary failure to pay wages does not give rise to conversion"]), the court observed that "[c]ontractual provisions may . . . determine whether a plaintiff has a possessory right to certain funds in the defendant's hands." (*Id.* at p. 1152.) And the court emphasized that "[t]he label" of the thing owed, whether " 'wages' or 'commissions' or 'fees' . . . is not determinative, provided that the claim otherwise satisfies the elements of the conversion tort." (*Id.* at p. 1156, fn. 11.)

"*reasoned* state or federal precedential decision holding that a cause of action for conversion will lie based on the ordinary nonpayment of wages," and observing that cases from other jurisdictions—that Filkins relies on in his briefing—"mentioned the conversion of wages . . . with little meaningful analysis" (italics added)].)

The Supreme Court distinguished *Department of Industrial Relations v. UI Video Stores, Inc.* (1997) 55 Cal.App.4th 1084, which defendant cites extensively in his briefing. In that case, the Division of Labor Standards Enforcement (DLSE) brought a conversion claim to recover from an employer checks it had issued to employees that were returned as undeliverable. The employer had issued the checks to reimburse employees for the cost of uniforms under a settlement agreement between the employer and DLSE. (*Id*. at pp. 1088-1089.) The Court of Appeal rejected the employer's argument DLSE could not assert a conversion claim on behalf of the employees on the basis it lacked authority to exercise dominion and control over the checks. (*Id*. at pp. 1095-1096.)

As the *Voris* court explained: "The act of conversion that the court recognized in *UI Video Stores* was the defendant's misappropriation of certain checks that it had cut and mailed to employees as part of the settlement agreement—checks that at least arguably became the property of the employees at that time. The defendant's failure to pay wages in the first instance was not remedied through a conversion claim, but rather through DLSE's enforcement action under the Labor Code. Whether the employees could have sustained a conversion action for the unpaid uniform reimbursements themselves is a matter that was not at issue in *UI Video Stores*, and which the court did not address." (*Voris, supra*, 7 Cal.5th at p. 1155.)

The court provided an example of a possible cognizable conversion claim arising out of "wages": "Take, for instance, an employer that pays wages but then removes the money from an employee's account, or that diverts withheld amounts from their intended purposes; that employer may well have committed conversion. (Cf. *U.S. v. Whiting* (7th Cir. 2006) 471 F.3d 792 [employer committed criminal conversion under federal statute by holding money deducted from employees' paychecks in the company's general operating account instead of delivering it to the employees' 401(k) plans or paying the employees' health insurance premiums; once employees had been paid, the deductions belonged to the employees and no longer belonged to the employer].)" (*Voris, supra*, 7 Cal.5th at p. 1156, fn. 11.)

In his briefing, Filkins rightly anticipated that *Voris* was likely to "inform the resolution" of this appeal.[4]

In light of *Voris*, we affirm the trial court's order sustaining Becker's demurrer to Filkins's complaint, because, in its current form, the complaint does not meet the pleading requirements for a conversion claim. This is so because the complaint and opposition to the demurrer suggested an *ordinary* failure to pay wages by FBD, which Filkins sought to remedy via a conversion claim that (Filkins maintained) was cognizable under California law as a *general* matter.

But Filkins must be given the opportunity to amend his original complaint because, in light of *Voris*, there is a reasonable possibility that Filkins can state an atypical conversion claim, given the written contract between the parties, and *Voris*'s recognition that contractual provisions, even concerning "wages," *may* give rise to a

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[4] Becker disagreed, contending that "incurable defects" in Filkins's complaint would make the "ultimate outcome of *Voris* . . . irrelevant" to this appeal.

plaintiff's possessory right to funds in a defendant's possession.[5] (*Voris, supra*, 7 Cal.5th at pp. 1152 & 1156, fn. 11; see *New Plumbing Contractors, Inc. v. Nationwide Mutual Ins. Co.* (1992) 7 Cal.App.4th 1088, 1098 ["the showing as to how the complaint may be amended need not be made to the trial court and can be made for the first time to the reviewing court"]; cf. *Schulz v. Neovi Data Corp*. (2007) 152 Cal.App.4th 86, 91-93 [even though civil complaint did "not meet the new pleading requirements" created by changes in law after briefing was completed on appeal, the plaintiff may have been able to allege additional facts to state a cause of action].)

In his pre-*Voris* briefing, Becker argued that Filkins "fails entirely to articulate what amendments could be made" to the original complaint. But for the reasoning we provided above, that argument is unavailing.

III

"California has adopted the common law rule for subjecting a defendant to liability for aiding and abetting a tort. ' "Liability may . . . be imposed on one who aids and abets the commission of an intentional tort if the person (a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act or (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person." [Citations.]' [Citation.]" (*Casey v. U.S. Bank Nat. Assn*. (2005) 127 Cal.App.4th 1138, 1144 (*Casey*).)

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[5] Filkins argued in the trial court that the Agreement did not *preclude* a conversion claim. Should he choose to pursue a tort of conversion claim against Becker, Filkins will have to plead how the Agreement *created* a possessory interest to deferred compensation and/or severance wages, and how FBD (aided and abetted by Becker) interfered with that possessory interest by virtue of FBD's own disposition of the property. (*Voris, supra*, 7 Cal.5th at p. 1151.)

Liability "depends on proof the defendant had actual knowledge of the specific primary wrong the defendant substantially assisted," (*Casey, supra*, 127 Cal.App.4th at p. 1145), which requires " 'an intentional participation *with knowledge of the object to be attained*' " and " '*the intent of facilitating the commission of that tort*.' " (*Id*. at p. 1146.)

The trial court concluded that Filkins failed "sufficiently [to] allege[ ] facts necessary to qualify Becker [as] an aider and abettor," reasoning that Filkins's allegations were "conclusory in nature and [did] not specifically allege substantial assistance or encouragement by [Becker] to convert [Filkins's] property." (Italics omitted.)

Filkins argues that he did sufficiently allege Becker's aiding and abetting the conversion of his unpaid wages.

We need not decide whether the trial court's reasoning was correct, because, assuming it was, Filkins should have been given an opportunity to amend his original complaint (1) at least once, "as a matter of fairness" (*City of Stockton v. Superior Court, supra*, 42 Cal.4th at p. 747), and (2) because Filkins has demonstrated in his briefing on appeal a reasonable possibility that he can cure the defects the trial court identified, at least in part, by invoking *Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 507 (*Frances T.*) for the proposition that Becker may be personally liable as a director of FBD who participated in the allegedly tortious conduct.[6] (See *Align Technology, Inc. v. Tran* (2009) 179 Cal.App.4th 949, 971-972 [ruling the trial court abused its discretion in denying leave to amend, where the plaintiff "met its burden of

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[6] Given our conclusion that Filkins will *have to amend his sole claim* if he wishes to pursue the conversion cause of action against Becker, a detailed analysis whether, in its current form, the complaint sufficiently pleaded that Becker aided and abetted the conversion is unwarranted. (Cf. *Campbell v. Superior Court* (1996) 44 Cal.App.4th 1308, 1322 [in light of its reversal of trial court's order sustaining the demurrer, appellate court "decline[d] to engage in an academic exercise" by analyzing "the sufficiency of [the plaintiff's] pleading," as such analysis "would be nothing more than an advisory opinion"].)

showing that there was a reasonable possibility it could have cured the complaint's defects" given, inter alia, the plaintiff's "showing to th[e appellate] court in support of its position"]; cf. *Voris, supra,* 7 Cal.5th at pp. 1149, 1159 [noting, but not ruling on, the plaintiff's contention that "individual officers who have either directed or participated in the employer's failure to pay" may be held personally liable for damages in tort under *Frances T.*].)

In his reply brief, Becker argues that even if our Supreme Court were to hold in *Voris* that a party *can* "state a claim for tortious conversion based on an employer's failure to pay unpaid earned wages," Filkins still "cannot set forth facts sufficient to establish a cause of action" against him, because—Becker seems to be arguing—he could only have aided and abetted FBD's tort of conversion if he knew what the tort was.[7]

We are unpersuaded by Becker's underdeveloped contention, which relies on *Casey* for support. In *Casey*, the court explained: "[A] defendant can only aid and abet another's tort if the defendant knows what 'that tort' is. As the Supreme Court put it in *Lomita* [*Land & Water Co. v. Robinson* (1908) 154 Cal. 36, 47], the defendant must have acted to aid the primary tortfeasor 'with knowledge of the object to be attained.' " (*Casey, supra,* 127 Cal.App.4th at p. 1146.)

Casey went on to apply that reasoning in ruling the trial court properly sustained a demurrer to a cause of action for aiding and abetting breach of fiduciary duty where (1) the allegation that the defendant knew fiduciaries were involved in a " 'criminal and wrongful enterprise' " was "too generic to satisfy the requirement of actual knowledge of a specific primary violation," and (2) a "conclusory allegation" that the defendant " 'acted with knowledge of the primary wrongdoing and realized that its conduct would

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[7] In his brief, Becker does not respond to Filkins's argument that, under *Frances T.*, Becker may be personally liable as a director of FBD.

substantially assist the accomplishment of the wrongful conduct' " did not "identify the primary wrong." (*Casey, supra,* 127 Cal.App.4th at p. 1153.)

Here, Filkins *did* identify the specific underlying "primary wrongdoing" that Becker allegedly aided and abetted: the intentional conversion of Filkins's unpaid wages via threats "to defame Filkins in order to persuade Filkins to waive his right to receive . . . the monies to which he was . . . entitled under the . . . Agreement."

The proposition recited in *Casey* that an aider and abettor must have "knowledge of the object to be attained," is unremarkable. But what *is* remarkable is the intimation in Becker's brief that, in order to state a cognizable claim against Becker as an aider and abettor of an intentional tort by FBD, Filkins had to allege that Becker knew the precise label that California might assign to FBD's allegedly wrongful conduct. Not so.

When the court in *Casey* said "the defendant must have acted to aid the primary tortfeasor 'with knowledge of the object to be attained,' " it clearly was *restating* the proposition in the immediately preceding sentence of the opinion: "[A] defendant can only aid and abet another's tort if the defendant knows what 'that tort' is." (*Casey, supra,* 127 Cal.App.4th at p. 1146.) "That tort" is the "object to be attained," i.e., the "specific primary violation"; not the label assigned to it.

Accordingly, Filkins should be given an opportunity to amend his original complaint.

DISPOSITION

The trial court's judgment and demurrer rulings are affirmed in part and reversed in part. We affirm the trial court's order sustaining the demurrer but reverse insofar as leave to amend was denied. In light of the mixed results here, the parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

/s/
RAYE, P. J.

We concur:

/s/
MAURO, J.

/s/
MURRAY, J.